FILE COPY

Office Supreme Court, U. S.
FILED
JUN 26 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, ET AL., APPELLANTS,

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION TO DISMISS OR AFFIRM.

PAUL F. GOOD,
GEORGE W. AYRES,
Counsel for Appellees.

INDEX.

SUBJECT INDEX.

	Page
Motion to dismiss or affirm	1

CASES CITED.

Jay Burns Baking Co. et al. v. Charles W. Bryan, as Governor of the State of Nebraska, et al., 264 U. S. 504	4
Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, 222 U. S. 380, 56 L. Ed. 240	2, 3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, ET AL., APPELLANTS,

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION TO DISMISS OR AFFIRM.

Come now the appellees (defendants), Charles W. Bryan, as Governor of the State of Nebraska, and Dwight F. Felton, as Deputy Secretary of the Depart-

ment of Agriculture of the State of Nebraska, and move that this case be affirmed or that the petition for appeal be dismissed for want of jurisdiction; and, in support of their motion, make the following brief statement of the matters involved and the reasons relied upon for a dismissal for want of jurisdiction.

Appellants challenge the validity of an act of the Legislature of Nebraska fixing standard weights for loaves of bread sold in the state and clothing the Secretary of the Department of Agriculture of the State with the power to prescribe reasonable tolerances in excess, but not under the weights mentioned in the statute. They allege that clothing the Secretary of the Department of Agriculture with power to prescribe excess tolerances is a delegation of legislative powers and that for that reason the statute conflicts with the State constitution. We submit that this is a question to be determined by the Supreme Court of Nebraska. That court has said:

> "Act fixing standard weights of bread loaves, authorizing secretary of agriculture to fix reasonable excess tolerances, held not invalid as delegation of legislative power (Comp. St. Supp. 1931, Secs. 89-169 to 89-172, Const. art. 2, Sec. 1).
>
> "Party complaining of regulations promulgated under legislative authority by state board on ground regulations are unreasonable and oppressive, should seek relief by applying to particular board."

Its ruling in that respect is in conformity with the ruling of this Court in the case of *Red "C" Oil Mfg.*

Co. v. *Board of Agriculture of North Carolina,* 222 U. S. 380, 56 L. ed. 240, in which this Court held that:

> "Legislative powers are not unconstitutionally delegated to the board of agriculture by the provisions of the North Carolina oil inspection act of March 8, 1909, which requires that illuminating oils sold or offered for sale in the state be safe, pure, and afford a satisfactory light, leaving it to the board to determine what oils will measure up to these standards."

Speaking further upon the questions involved in that case, Chief Justice White, who wrote the opinion, said:

> "We have not attempted to enumerate the objections urged against the rules and regulations adopted by the board of agriculture. The court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them."

We submit the principle involved in that case was identical in all respects with the principle involved in the instant case and that before the appellants can be heard to complain that the rules and regulations adopted by the Secretary of the Department of Agriculture of the State of Nebraska are unreasonable or oppressive, they should make application to that official to modify said rules and regulations. In this connection we call attention to the fact that the statute

assailed in the instant case differs from the statute held unreasonable and void in the case of *Jay Burns Baking Co., et al.*, v. *Charles W. Bryan,* as Governor of the State of Nebraska, et al., 264 U. S. 504, in which this Court said that:

> "A statute requiring bread in quantities of twenty-five loaves to maintain a specified weight twenty-four hours after baking, with a limit of variation so narrow that it can be maintained only by wrapping the bread, or by other artificial means, is unreasonable and void.

In that case the tolerance was fixed by the statute and no board or official was clothed with power to change it. The maximum excess tolerance permissible in a pound loaf of bread under that statute was two ounces and the minimum weight was required by the statute to be maintained for at least twenty-four hours. In the instant case, under the rules established by the Secretary of the Department of Agriculture, an excess tolerance of three ounces for each pound of bread is permissible and the minimum weight need not be maintained for a longer period than twelve hours; and not that length of time in case the bread is delivered before that time to a retail dealer or consumer or is placed in charge of a transportation agency in the State for delivery to a retailer or consumer.

Respectfully submitted.

PAUL F. GOOD,
Attorney General,
GEO. W. AYRES,
Assistant Attorney General,
Counsel for Appellees.